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ADDRESSING HUMAN RIGHTS ABUSES: TRUTH COMMISSIONS AND THE VALUE OF AMNESTY*

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I. THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA

MR. SCHEY: I'll be addressing my comments particularly to the evolution of the Truth and Reconciliation Commission in South Africa. One of the greatest challenges that faced the new South Africa was to come to grips with the country's bitter heritage of apartheid on the one hand, while creating an atmosphere, which the majority black and the minority white population felt that they could work together towards a common good.

In the process of reaching the goal of reconciliation, the goals of justice and redress were largely sacrificed. In essence, the deal that the African National Congress ("ANC") made with the previous white government was to set up a truth commission headed by Archbishop Desmond Tutu.¹ To some extent that was most likely based on the recognition that the ANC did not ride into the capital of South Africa, Pretoria, on tanks and did not have the type of political power that

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1. Justin M. Swartz, *South Africa's Truth and Reconciliation Commission: A Functional Equivalent to Prosecution*, 3 DEPAUL DIG. INT'L L. 13 (1997).

other political parties have when they seized state power through military action. This was, in effect, a negotiated settlement to provide a transition to democracy. Part of the deal involved the establishment of the truth commission.² The principal purposes of the truth commission are essentially threefold.³ The *modus operandi* is to offer amnesty to people who fully and completely confess all of their crimes. Second, the commission is also empowered to address issues of reparations. The third purpose of the truth commission it is to expose the dark and violent past of apartheid. The commission was set up pursuant to the interim constitution of 1994,⁴ the final clause of which read in part as follows:

The constitution provides a historic bridge between the past of the deeply divided society characterized by strife, conflict, untold suffering, and injustice and a future rounded on the recognition of human rights, democracy, and peaceful coexistence. The adoption of this constitution lays a secure foundation for the people of South Africa to transcend the divisions and strive for the past which generated gross violations of human rights. These can now be addressed on the basis that there is a need for understanding, but not for vengeance, a need for reparation, but not for retaliation, a need for *buntu* [an African word for forgiveness and understanding] and recognizing the fullness of a person and their contributions to society, not just their harsh criminal acts, but not for victimization.⁵

The truth commission has sixteen members, comprised mostly of relatively impartial figures joined from the human rights community, including several psychologists and several academics.⁶ It is funded

2. Republic of South Africa Promotion of National Unity and Reconciliation Bill (As submitted by the Portfolio Committee on Justice (National Assembly)), 1994, Bill 30-95 (hereinafter "Promotion of National Unity and Reconciliation Bill"), ch. 2.

3. The stated objectives of the commission are "to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past." *Id.* § 3(1).

4. See Karen Cavanaugh, Note, *Emerging South Africa: Human Rights Responses in the Post Apartheid Era*, 5 CARDOZO J. INT'L & COMP. L. 291, 293-95 (1997).

5. S. AFR. CONST. (Act No. 200, 1993), ch. 5, § 73(1).

6. The following people are the members of the Truth and Reconciliation Commission: Archbishop Desmond Tutu (chairperson); Dr. Alex Boraine, a minister who served as executive director of the Institute for Democracy in South Africa from 1986 to 1990, (deputy chairperson); Mrs. Mary Burton, former president of the Black Sash; Chris de Jager, a lawyer, Freedom Front member, and member of the Volkstaat (Afrikaner homeland); Rev. Bongani Finca, president of the Eastern Cape of Privilcia of Churches; Ms. Sisi Kamphephe, a lawyer and member of the Black Lawyer's Association; Mr. Richard Lyster, a lawyer and director of the Legal Resources Centre in Durban; Mr. Wynand Malan, who resigned as a National Party MP under former state president P.W. Botha; Ms. Hlengiwe Mkhize, a psy-

both by the government of the United States, as well as by some international sources.⁷ Out of the sixteen to eighteen truth commissions that have been set up in the past, this particular truth commission is probably the best funded, with a budget of about \$40 million. The truth commission has a staff of approximately 150 people. It has been given a mandate to operate for two years, and is currently in its second year.

The truth commission is considering the human rights abuses from a defined period that, again, was negotiated between the out-going government and the ANC. The commission's mandate commences with the March, 1960 Sharpeville massacre, in which sixty nine black demonstrators were killed by police, and it ends with the December 6, 1993 establishment of the transitional government by the ANC.⁸ The commission is charged with investigating crimes, with determining compensation, and considering amnesty in exchange for truthful confessions.⁹ In sharp contrast to the sixteen or so other truth commissions previously established in Chile, El Salvador, and elsewhere, this commission was established by an act of parliament, not by presidential decree.¹⁰ The Commission has subpoena power,¹¹ and it may offer witnesses protection in various ways, including, as previously mentioned, complete amnesty for crimes committed.¹² It also has the power, of course, to decide who gets amnesty; however, it has no power to prosecute or to punish.¹³ It also does not appear that appeals from the Commission decisions to the judiciary are appropriate. The Commission is divided into three committees: the Committee on Human Rights Violations, the Committee on Amnesty, and the Committee on Reparation and Reha-

chologist who is the national director of mental health and substance abuse; Mr. Sumisa Ntsebeza, an attorney and the Black Lawyers' Association publicity secretary; Dr. Wendy Orr, deputy registrar of student affairs at the University of Capetown; Dr. Mapule Ramashala, a clinical psychologist and researcher; Dr. Yasmin Sooka, a lawyer and national president of the World Conference on Religion and Peace; Ms. Glenda Wildschut, a social worker; Rev. K.M. Mqojo, a clergyman; and Advocate Denzil Potieter. Cavanaugh, *supra* note 4, at 326 (citing *Members of Truth and Reconciliation Commission Named*, Reuters News Service, Dec. 1, 1995, available in LEXIS, World Library).

7. Bob Drogin, *Peace Corps Heading for South Africa in '96*, L.A. TIMES, Dec. 6, 1995, at A12.

8. Act 30 of 1995, § 20(2). See also Lynne Duke, *South Africa Establishes 'Truth' Panel; Commission to Probe Abuses of Apartheid*, WASH. POST, July 20, 1995, at A24.

9. Duke, *supra* note 8.

10. See Michael P. Scharf, *The Case for a Permanent International Truth Commission*, 7 Duke J. Comp. & Int'l L. 375 (1997).

11. Promotion of National Unity and Reconciliation Bill, *supra* note 2, ch.3, § 30(b).

12. Duke, *supra* note 8.

13. *Id.*

bilitation.¹⁴ One of the significant problems with the Commission is that upon an amnesty being granted to human rights abusers and violators, the amnesty is both a civil and a criminal amnesty.¹⁵

The Commission would appear to exonerate both the individual as well as the state, potentially leaving families in situations of receiving no compensation at all. If an individual acknowledges the crime and can prove that it was committed in furtherance of aims of a political party or political organization, under those circumstances an amnesty may be extended by the commission.¹⁶ Close to 4,500 people have applied for amnesty to the commission. Most of these are low-level police officers, police agents, and security agents. While there have been some highly publicized recent cases in which people, former police officers and high officials, have sought amnesty from the commission,¹⁷ by and large, the commission has not drawn out high former government officials. Recently, Colonel Eugene Decock, who was on trial for approximately 121 criminal charges, including eight murders, came forward and testified before the commission. Much to the commission's delight, Decock pointed a finger at ex-President Frederik Willem de Klerk and other top national party officials. This is exactly the result the Commission's members desired.

Whenever there have been accusations against high government officials for having knowledge of political assassinations, the commission has basically stated that their goal is being fulfilled, because they are finally shedding light on matters that otherwise the country would not have known about.¹⁸ Also, recently, the former national police chief, General Johann van Nerva, told the Amnesty Committee that P. W. Botha, the president of South Africa before de Klerk, had given the go-ahead for at least two operations against anti-apartheid activists in the 1980s. These included the distribution of booby-trapped grenades to

14. Promotion of National Unity and Reconciliation Bill, *supra* note 2, ch.3.

15. Act 34 of 1995, § 3(1) (b) (S. Afr.). The Act is also commonly known as the Truth and Reconciliation Act [hereinafter Truth and Reconciliation Act]. The Act, in part, states:

No person who has been granted amnesty in respect of an act, omission or offense shall be criminally or civilly liable in respect of such act, omission or offense and no body or organization or the State shall be liable, and no person shall be vicariously liable, for any such act, omission or offense. *Id.* at § 20(7).

See generally Judith Hippler Bello & Daniel F. Wilhelm, *South Africa--Promotion of National Unity and Reconciliation Act of 1995*, 91 AM. J. INT'L L. 360, 362 (1997).

16. Truth and Reconciliation Act, *supra* note 15.

17. See Cavanaugh *supra* note 4, at 320.

18. F. W. De Klerk *Ignores Part of the Truth*, ST. LOUIS POST, Aug. 27, 1996, at 12B.

student activists. The grenades were given out clandestinely, to students, and would explode the moment that the pin was pulled on the grenade. De Nerva had applied for amnesty only after learning that five low-level police officers were applying for amnesty and were prepared to testify against him in the killing of Steven Biko. Interestingly enough, Steven Biko's family, in July of 1996, challenged the power and the scope of authority of the Commission. In particular, the Biko family challenged the ability of the Commission to grant amnesty and take away the right of people to obtain compensation. The Biko case was heard by the constitutional court, and a decision was issued late in July, 1996.¹⁹ The deputy decision was written by the deputy-president of the constitutional court, Ismael Mohammed, who was the former personal attorney of Nelson Mandela.²⁰

Approximately 47 hearings were held in 1996 throughout the country. These were often televised. Ten amnesty hearings were held, and all of the major political parties, including the South African Defense Force, came forward and presented their views. These political parties have all provided submissions and have had their day before the truth Commission. Most of those reports, and in particular, the report of the African National Congress were very strident in their terminology about the scope and nature of human rights abuses that had taken place. In contrast to that, the report of the nationalists' party was timid and very tepid in terms of its description. The Nationalists Party basically stated that they were just doing their best in a difficult situation. Essentially, they were experimenting with racial separation. That was an apologist position, as was the position offered by the South African Defense forces.

Let us turn now to some of the policy issues and observations. Today there is wide agreement that international law does not permit amnesty to pardon crimes against humanity, including torture, extra-legal executions, and disappearances.²¹ Nevertheless, in the interests of national reconciliation, an amnesty law may forgive political crimes against the state, including, for example, treason and less serious common crimes. The United Nations Convention Against Torture and Other Cruel, Inhumane or Degrading Punishment binds the contracting states to punish crimes against humanity.²² A state shielding its representa-

19. *Apartheid Killer's Right to Amnesty Upheld*, SAN DIEGO UNION & TRIB., July 26, 1996, at A15.

20. *Id.*

21. Promotion of National Unity and Reconciliation Bill, *supra* note 2, ch.3, § 21.

22. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or

tives from prosecution for crimes against humanity would clearly be proscribed under the convention. Governments must uphold these rights, even during public emergencies.

Customary international law would be violated by granting amnesty for repeated instances of torture, extra-legal execution, and disappearances. The trend in international law is clearly and rightly to adopt conventions that require states parties to criminalize, prosecute, and punish atrocious crimes. Sixty experts, including legislators, lawyers and victims from around the world met in November, 1992 in Geneva. The so-called international meeting concerning impunity for perpetrators of gross human rights violations was organized by the International Commission of Jurists and the Commission Internationale Consultative de Droit de la Homme de France under the auspices of the United Nations. This group issued an appeal that made five basic points: first, the lack of prosecution of persons for crimes against humanity has made impunity a universal phenomenon, and constitutes an outrage for the victims; further, the group found this to be a serious obstacle to the development of democracy and incited new violations; second, impunity is a denial of justice and a violation of international law; third, impunity cannot question the principles of law by justifying the barbarity in the name of the state or allegiance to the prevailing party; fourth, national solutions should not impede full respect for international commitments concerning the state's duty to prosecute and judge those responsible for the most serious violations; and fifth, restrictions on legal punishment, which might be authorized in exceptional circumstances, in order to favor the return to peace or the transition to democracy, should be subordinated to the rights of victims and their lawful beneficiaries, which include the right to know the truth, the right to equitable compensation, and, if appropriate, the right to full rehabilitation. While the issue of national reconciliation is certainly an important one, trials in accordance with law and proper due process procedures can channel feelings of personal vengeance by victims into more acceptable channels. Relatives and friends of victims, as well as entire communities, victimized by human rights violators will be less likely to engage in vigilante homegrown justice if a judicial system assumes responsibility for enforcing the law. In a 1994 United Nations study of an amnesty law, the Special Rapporteur concluded that an amnesty covering persons guilty of conduct involving serious infringement of

Punishment, adopted Dec. 10, 1984, S. TREATY DOC. NO. 95-2.

human dignity, far from encouraging national reconciliation, would only increase internal tensions.²³ And finally, there are several recommendations that I would make to the truth commission in South Africa, to the South African attorney general, and parliament.

First, there really should be no amnesty for crimes against humanity committed against the people of South Africa. To provide such a broad amnesty violates international law. Victims of gross violations of human rights are entitled to have the violators brought to justice by the state. All South Africans and the state are entitled to impose punishment for gross violations of human rights in order to deter such violations in the future. Second, in the interest of national reconciliation, political crimes against the state, such as treason, as well as less serious common crimes, such as assault, theft, and battery may be pardoned. Amnesty limited to crimes against the state and less serious crimes is justifiable as a step toward national reconciliation. Third, whether to grant amnesty at all should be a matter determined by the truth commission, but should be reviewable by the courts. The truth commission should not be the final arbiter of these questions. Fourth, an amnesty law should neither prohibit nor make more difficult the rights of victims of human rights abuses to seek just compensation for their suffering. The state should make available to victims judicial remedies, including compensation paid by human rights violators and, in appropriate cases, the state itself should provide compensation. The state should also assist indigent victims of human rights abuses by providing legal counsel to assist in the prosecution of claims for compensation and, perhaps equally as important, enforcement of court judgments made in favor of victims. Finally, persons alleged to have committed crimes against humanity should receive fair and public trials and have the right to legal counsel and to present defenses. Such persons should not be declared guilty other than by a court of law following a fair trial, and their punishment should be measured by the severity of their crimes, not by extraneous political considerations. So, in short, there are some serious shortcomings in the South African truth commission's procedures, in its mandate and in its process. These shortcomings leave significant room for justice, criminal justice and civil justice through compensation. However, I think that the structures set up are probably adequate to expose and to bring about a fuller understanding of the history, the

23. Study on Amnesty Laws and their Role in the Safeguard and Promotion of Human Rights, Prelim. Rept. by Mr. Louis Joinet, Special Rapporteur, U.N. Comm'n on Hum. Rts. (Provisional Agenda Item 9(a)), U.N. Doc. E/CN.4/Sub.2/1985/16 (1985).

violent history, of apartheid.

There is obvious tension in South Africa between the desire for national reconciliation, the pressures to try and achieve some degree of peace and the pressures as to the possibility that if amnesty is granted international law may be violated. People are essentially forgiven that may not deserve to be forgiven.

II. TRUTH COMMISSIONS IN LATIN AMERICA

MS. SHELTON: Truth commissions are often identified with Latin America. In the 20 year period between 1974 and 1994, one-third of all truth commissions were established in Latin America.²⁴

Bolivia was the first, where an investigation was commissioned by the president of the country to look into 155 cases of disappearances. Although there were eight commissioners and six staff members, political will disappeared and no final report was ever issued.

However, the creation of the commission did have a dramatic impact on non-governmental organizations in Argentina, who pressed for the creation of a truth commission to investigate the events political "disappearances" and other abuses between 1976 and 1983.²⁵ More than 9,000 cases were documented in a report that was issued in book form called *Nunca Mas*.²⁶

The third commission, in Uruguay, was the only one to have been established by a Parliamentary Act.²⁷ In that case 164 disappearances were turned over to commission that was comprised of nine commissioners.²⁸ During this period, disappearances were not typical of the repressions in Uruguay. Thus, by commissioning their truth commission to look just at disappearances, the government avoided having to deal with most violations concerning incarcerations and torture.

Next, Chile, through a limited mandate by the president, formed a commission which could only look into human rights violations that

24. Jo M. Pasqualucci, *The Whole Truth And Nothing But The Truth: Truth Commissions, Impunity And The Inter-American Human Rights System*, 12 B.U. INT'L L.J. 336 (1994).

25. *Id.* at 337.

26. Commission Nacional Sobre la Desaparicion de Personas, *Nunca Mas* [National Commission on the Disappearance of Persons, Never Again] (Universitaria de Buenos Aires, 4th ed. 1984).

27. Gregory Jowdy, *Truth Commissions In El Salvador and Guatemala: A Proposal For Truth In Guatemala*, 17 B.C. THIRD WORLD L.J. 285 (1997).

28. *Id.*

resulted in death, disappearance or torture.²⁹ The commission was excluded, as in the case with Guatemala, in reporting on any individual liability. In the end, the commission produced an 1,800-page report in 2,900 cases. The president, in an interesting follow up after receiving the report, made a formal public apology to the victims and their families and also asked the army to acknowledge its roles in the violations that occurred.

The next report, which was the first of the truth commissions in Latin America established by the United Nations mandate, was on El Salvador.³⁰ It was not only a truth commission that had been composed entirely of non-nationals of the state being investigated, but its recommendations were legally binding upon the government.³¹ More recently, in Guatemala, a truth commission was established, like that in El Salvador, pursuant to peace accords at the end of the civil war.³²

On March 28th, 1995, a presidential decree in Haiti also created a national commission. The National Commission on Truth and Justice in Haiti studied the gravest violations of human rights committed between 1991 and 1994. The unusually mixed commission, which is comprised of Haitian nationals and of foreign nationals, will be able to look at complaints that have been filed by individuals.

In addition, an attorney with the Inter-American Commission on Human Rights is serving as the director of the investigative unit, so that it is only partially a "national" truth commission. With significant aid coming from the Inter-American Commission on Human Rights, not only has the attorney been sent to work for the Haitian Commission, but the Inter-American Commission has turned over all of its files on Haiti including individual complaints and the country reports. The commission is not only going to write up an initial report based upon its findings and its work with forensic experts, but in a second stage will examine individual complaints. Thus, it is not only a truth commission, but it will also be, in part, a reparations or a redress commission.

Finally, although it is not a truth commission, the work of the Honduran ombudsman, Leo Valledares, is related because he has viewed his role as ombudsman as being very similar to that of the truth commission, that is, revealing what has happened in a number of cas-

29. Pasqualucci, *supra* note 24, at 338.

30. Jowdy, *supra* note 27, at 297.

31. *Id.* at 298.

32. *Id.* at 305.

es.³³

The widespread experience of truth commissions in Latin America can be attributed to both positive and negative factors. A positive factor is that, whatever may be the customary international law on the issue, it is clear that in the Inter-American Regional Human Rights System it is legally required to conduct such investigations.³⁴

The first contentious decision of the Inter-American Court of Human Rights clearly stated that every state in the system has a legal duty to carry out reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction to identify those responsible, impose the appropriate punishment, and ensure the victim adequate compensation.³⁵ As for acts that violate the convention³⁶ that are not seriously investigated, the government commits a violation of its duty to ensure respect for human rights.³⁷

From the perspective of the supervisory organs, truth commissions serve three different purposes. First, is an acknowledgment by the government of the truth, as opposed to fact finding, since in many of these cases, the truth is widely known. For example, there was little doubt that human rights abuses were being committed in Argentina by the government, but however widespread those violations were, they did not touch the majority of people in Argentina. From the perspective of many in the majority, there was a suspicion as there is in many of these cases, that the victims deserved what they got. That somehow the victims were responsible for provoking the government into the actions it took. Consequently, it becomes very important for the government to acknowledge, in a way that is tantamount to a confession, that these were innocent victims whose rights were violated.

Therefore, acknowledgment of the truth is a fundamental purpose a truth commission. President Aylwin's apology, for example, in the Chilean case is indicative of the kind of result one might expect from a truth commission that fulfills its intended purposes.³⁸

Secondly, the right to know the truth is important in order to prevent repetition of such acts in the future. There is an assumption

33. Pasqualucci, *supra* note 24, at 341.

34. *Id.* at 329.

35. Velasquez Rodriguez Case, Inter-Am. Ct. H.R. (ser C) No. 4, para. 174, OAS/ser. L/V/III.19, doc. 13 (1988).

36. American Convention on Human Rights, Jun. 1, 1977, S. TREATY DOC. NO. 95-2.

37. Pasqualucci, *supra* note 24, at 329.

38. *Id.* at 339.

that revelations about the causation of what occurred will have a deterrent effect on human rights violations in the future. Although there has probably not been many empirical studies to study whether, in fact, there is a deterrent effect. However, many of the truth commissions do include specific measures of legal reform and policy reform. In some cases, as in El Salvador or Argentina, these specific measures are held to be legally binding upon the government, whereas in other cases, such as Chile, they are implemented by the government.³⁹

Finally, the truth commissions conduct their fact-finding and obtain information as a preliminary to investigation and punishment of wrong doers, as well as providing redress to the victims. This is the justice phase. Thus, there is the truth phase and the justice phase.

The less positive reasons for so many truth commissions in Latin America has to do precisely with this last reason, since in many cases the truth commissions are not serving as a preliminary to justice, but as a substitution for justice. Thus, the truth commissions, in the name of reconciliation, act in a way that avoids accountability, and avoids any serious prosecution or redress. In some cases, the truth commissions may actually serve as a cover-up.

As for those who think this is somewhat of an overstatement, the first truth commission was set up by Idi Amin. Reacting to serious pressure by the United Nations to clean up its human rights performance in Uganda, Amin decided he would construct a truth commission to investigate. Of course, no serious problems were found.

In South Africa, someone who had been a high up in the military division of the ANC, reported that, in the terms of amnesty and the role of the truth commission there, violations on both sides occurred.⁴⁰ In addition, there are those within the ANC who do not want to see a full investigation, lest their side be equally accused of human rights violations. Therefore, the link between the truth and justice must be maintained, lest the truth commissions turn into a kind of cover-up.

As far as the outcomes of truth commissions in Latin America, all of them, with the exception of Bolivia, have fulfilled the first purpose. That is, there has been an acknowledgment by the government of the violations that have occurred. There has been less fulfillment of the second objective, that is, the implementation of specific measures of

39. *Id.*

40. See Richard J. Goldstone, *Justice As A Tool For Peace-Making: Truth Commissions and International Criminal Tribunals*, 28 N.Y.U. J. INT'L L. & POL. 485, 494 (1996).

reform. Finally, there has been almost no action on the third, which is the investigation, punishment and provision of redress.

Almost all the truth commissions in Latin America have ended with either a *de jure* or a *de facto* amnesty. In the case of El Salvador, an amnesty was declared after the truth commission report came out naming certain individuals as responsible for violations that occurred. Amnesty was then declared on behalf of those individuals.⁴¹

Various factors and problems may come up that may dictate whether or not a truth commission will be successful. First, it depends on who sets it up and how it is set up, since the creation of it will control the scope. An executive branch that does not really want to have a full-scale investigation, or a legislative branch, as in Uruguay, may set up the commission with such a limited mandate that the major part of the violations are excluded from the truth commissions work.

Secondly, any human rights fact-finding requires material resources. The limited resources and the weight of material may make it very difficult. Argentina, for example, had 60 persons trying to deal with over 10,000 different cases.

Third, is the need for expertise. Forensic experts are necessary to determine where the disappeared may be. And this is, of course not limited to truth commissions. Ethiopia, which has opted for prosecution, has charged 5,198 former officials for offenses that range from war crimes, to genocide, to aggravated assault. It took six years to get all the material to charge some of these people, who have been in prison throughout that period.

Fourth, it is important who is on the truth commission and who conducts the inquiries. Should it be those from within the country or those from without the country? In Chile, for example, some said that the commission was hampered because many in the military charged that it was a victor's justice, that the commission was politically motivated.

On the other hand, those within the country may have more knowledge and be more sensitive to the problems that are there. Thus, it is not entirely clear whether this should be an outside or inside investigation.

The largest legal problem that all of the truth commissions have faced has been whether to name individual wrongdoers. This has led to different conclusions on this issue. In Chile, Jose Zalket, who was one

41. Jowdy, *supra* note 27, at 300.

of the members of the commission, argued that truth commissions should never name individual violators or suspects. He said to name culprits who had not defended themselves and were not obliged to do so, would have been the moral equivalent to convicting someone without due process. This would be in contradiction with the spirit, if not the letter, of the rule of law and human rights principles.

Alternatively, in El Salvador's report, it was decided that they would name officials. The report named over 40 persons, the majority of whom were military officers. The person, however, who was perhaps most scathingly denounced was the president of the Supreme Court. They were all interviewed and given the opportunity to defend themselves. The commission reported that they should all be removed from their positions and barred from serving in any public position for ten years, and all should be permanently barred from the military or security forces.⁴² The commission justified this by stating that it had no alternative but to do this because the peace agreements called for the complete truth, which it said could not be known without naming names. In addition, the commission said they were charged not to deliver an academic report, or an abstract report, but a real report that would be based on reliable testimony. Not naming names, they said, would reinforce the very impunity to which the parties instructed the commission to put an end.

The final issue, is what to do after the report has been issued—how to publish it, when to publish, if to publish it. In at least one case, the truth commission report was never made public which would cause one to wonder what the purpose was of having it in the first place.

Nunca Mas, the report in Argentina, became a best seller. Furthermore, Argentina put together a two-hour movie for prime time television of excerpts of the testimony and held repeated press briefings. By contrast, the Chilean report almost disappeared, because within three weeks of its publication, there were three political assassinations in Chile that vastly overshadowed the report of the committee. Nonetheless, many of the recommendations were implemented.

Finally, is it useful to have truth commissions? Probably yes. On the part of many victims, having the validation of the government acknowledgment of wrongdoing is in itself very significant. Moreover, not to get that acknowledgment may result in long-term and repetition of the cycle of violence and vigilante justice. There has not been any

42. Pasqualucci, *supra* note 24, at 341.

case thus far in which a truth commission report has made the situation worse or has hampered reconciliation. On the other hand, it is very clear that truth commissions are not enough. They are the beginning; the truth comes first, but the truth must be followed by justice.

III. PROSECUTION OR AMNESTY?

MS. ROHT-ARRIAZA: In this section, I will focus on two separate issues. First, the choices that different transitional and post-transitional governments make in regard to such issues as investigation, prosecution, and redress of political crimes, and to what extent they are constrained by international obligations. Second, the goals of government and what affect these goals have on different levels, whether it be the international, national, or local level.

Governments make choices that are constrained by international law. At present, there are certain obligations governments have under international law, such as investigation into crimes against humanity, genocide, and the systematic and widespread violation of human rights. These crimes are not permitted under international law and there has to be some redress for the victims. However, it is unclear whether the redress should come from the state, individual perpetrator, or from somewhere else.

Where do these obligations and laws against humanity come from? First, they come from treaties. The clearest case is the Genocide Convention,⁴³ requiring prosecution of those committing genocide, whether the person is a constitutionally responsible ruler, public official, or private individual.⁴⁴ Similarly, grave breaches of the Geneva Conventions⁴⁵ *must* be prosecuted.⁴⁶ However, it is important to note that the grave breaches provision requiring prosecutions, by its terms, applies only in international conflicts, not in civil conflicts.⁴⁷ Moreover, there are some questions as to where the obligation arises to prosecute in the case of civil wars. There is an argument that the distinction between international and non-international armed conflict is in the process of disappearing; that the formations of ad hoc tribunals for the former

43. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, S. TREATY DOC. NO. 81-1.

44. *Id.*

45. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3517 [hereinafter Geneva Convention].

46. *Id.* at 3618.

47. *Id.*

Yugoslavia and Rwanda are hastening that process, but, in all fairness, it is not quite to that point at the present time.

The Torture Convention⁴⁸ specifically requires that complaints of torture be investigated, and offenders be extradited or their case submitted to the proper authorities for prosecution.⁴⁹ Thus, when there are cases of torture and a state that has signed the Torture Convention, there's a fairly clear, explicit obligation to prosecute perpetrators, including redress and compensation for the victims.

Additionally, there are general human rights treaties. The general treaties have been interpreted to require investigation, prosecution, and redress of the most basic non-degenerable rights. The European Commission of Human Rights, for instance, has interpreted the International Covenant on Civil and Political Rights⁵⁰ to require investigation, prosecution, and redress, and has stated that amnesties are generally incompatible with the duty of states.⁵¹

The Inter-American Court has stated that under the American Convention,⁵² the state has a legal duty to use the means at its disposal to carry out serious investigation, identify those responsible, impose the appropriate punishment, and ensure the victim adequate compensation.⁵³ The Inter-American Commission on Human Rights has actually gone even further. The Commission has found that amnesties granted Uruguay, Argentina, and El Salvador are contrary to the American Convention.⁵⁴ Moreover, the Commission stated that there is a right to a fair trial.⁵⁵ A fair trial includes actually having the trial take place.⁵⁶ Thus, the Commission found violations of the American Convention in amnesties that were passed in these countries.⁵⁷

The interesting fact about the amnesties in Uruguay, Argentina, and El Salvador, is that the governments defended their position by stating that the violations were necessary for social peace and necessary for the process of reconciliation. The Commission has responded by

48. Convention Against Torture, *supra* note 22.

49. *Id.*

50. Dec. 16, 1966, S. TREATY DOC. NO. 95-2, 999 U.N.T.S. 171.

51. *Id.*

52. American Convention on Human Rights, *supra* note 36.

53. Inter-American Court of Human Rights: Advisory Opinion on International Responsibility for the Promulgation and Enforcement of Laws in Violation of the American Convention on Human Rights, September, 1995, 34 I.L.M. 1188.

54. *Id.*

55. American Convention on Human Rights, *supra* note 36, Art. 8.2h.

56. Inter-American Court of Human Rights: Advisory Opinion, *supra* note 53.

57. *Id.*

stating that a domestic law cannot take precedence over international legal obligations.

There is additionally some helpful treaty law. Article Six of Protocol Two of the Geneva Conventions states that Protocol Two applies to civil wars and non-international armed conflicts.⁵⁸ Protocol Two states that at the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons that have participated in the armed conflict or those deprived of their liberty for reasons related to the armed conflict.⁵⁹ This passage is placed at the end of an article guaranteeing due process rights for individuals. It is fairly clear that it was not meant to apply to agents of the state. Rather, it was meant to apply to persons that were combating the state. Nonetheless, the language is there, and there have been a number of courts that have grabbed on to this language to endorse the argument that international law does not require any kind of prosecution.

Looking beyond treaties, there is the question of customary law obligation. There is a trend in the direction of requiring at least some investigation, and disapproving the use of blanket amnesties in the case of crimes against humanity, war crimes, and genocide. Where does such a trend come from? The establishment of Yugoslav and Rwandan tribunals is based on the view that the provisions of the genocide convention, prosecution of war crimes and crimes against humanity, and the Nuremberg precedent, all represent customary international law. There is also the idea that prosecution may be necessary to establish a lasting peace.

Additionally, there are a series of international compensation commissions such as the Gulf War Compensation Commission.⁶⁰ There have been other compensation commissions created in the last couple of years. There is a large number of United Nations declarations on forced disappearances, prevention, and investigation of summary execution and basic principles of justice. These declarations pronounce the same standards: There must be an investigation; prosecution of those accused of serious violations of human rights; specific disallowance of blanket amnesties; and redress and compensation.

Additionally, there are a series of reports emanating from the U.N. Human Rights Subcommission. These reports state in specific terms the requirements for truth, justice, and compensation as necessary compo-

58. Geneva Convention, *supra* note 45, at 3522.

59. Geneva Convention, *supra* note 45, at 3521-22.

60. S.C. Res. 692, U.N. SCOR, 46th Sess., 2987th Mtg., U.N. Doc. S/RES/692 (1991).

nents in the fight against impunity. A recent report, although proposing principles against impunity, is very weak on the question of amnesty.⁶¹ This report states that when an amnesty is intended to establish conditions conducive to a peace agreement or to foster national reconciliation, the perpetrators of serious crimes, under international law and guilty of gross and systematic violations, may not be included in the amnesty as long as the victims have been unable to avail themselves of an effective remedy or obtain a fair and effective decision.⁶² However, it is unclear exactly what the report means. It appears that the subcommission did not want to squarely confront the issue, thus, the ambiguous and unclear language.

State practice is quite mixed in this area. While there have been many amnesties granted, there have also been many not granted. Moreover, there have been a number of decisions by national courts, such as in the South African Constitutional Court. In Latin America, there are a number of cases where lower courts have overturned amnesties based on international law considerations. The cases usually reach the Supreme Court and get reversed on either of two grounds. First, the courts have used the Protocol Two language.⁶³ Second, the courts have stated that a constitutionally mandated law cannot be overridden by international law. Thus, there are a number of very good lower court decisions and very bad high court decisions.

However, there are exceptions. The Honduran Courts, for instance, have come out with good decisions, arguing that international law means there cannot be blanket amnesty. In a recent Spanish case, the judge issued an international arrest warrant for Argentine General Leopoldo Galtieri for the disappearance of several Spanish citizens in Argentina during the dirty war of the Seventies.⁶⁴ The judge cited U.N. and OAS resolutions against amnesties and held that an illegal domestic amnesty cannot bind the courts of another state and, therefore, there was no reason why Galtieri could not be tried for genocide and

61. Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, Question of the Impunity of Perpetrators of Violations of Human Rights: Final Report Prepared by Mr. Louis Joinet, Pursuant to Subcommission Resolution 1995/35, Commission on Human Rights, Subcommission on Prevention of Discrimination and Protection of Minorities, 48th Sess., Agenda Item 10, at 12, U.N. Doc. E/CN.4/Sub.2/1996/18 (1996).

62. *Id.*

63. Geneva Convention, *supra* note 45, at 3521-22

64. Leon Lazaroff, *Ex-Argentine Dictator Ordered Arrested in Disappearance of Spaniards*, ASSOCIATED PRESS, Mar. 25, 1997, available in 1997 WL 4859107.

terrorism in Spanish courts, even though he had been granted amnesties by the Argentine courts. Obviously, Galtieri is not going to get on a plane and go to Spain to have his trial. If Galtieri goes outside Argentina, he may be subject to arrest. As long as he stays in Argentina, the Argentine government has stated that it will not enforce the Spanish courts ruling because it is a violation of its national sovereignty.⁶⁵ Thus, the Argentine government is not willing to cooperate. However, if Galtieri should decide to go on a shopping trip to Paris, he is subject to an international arrest warrant.

It is important to note that investigation, prosecution, and redress all fit together. One is not a substitute for the other. One danger in this area is assuming that an investigation or procedure is somehow the same as a prosecution when in fact it is not. They are two very different things and either can work against each other or for each other. An example of how they work with each other is the South African example, demonstrating that the process has worked. It has worked because there is preclusion against prosecution of people who come forward to claim amnesty. The people that have come forward and given information not already obtained, have done so because other policemen have been charged and are in the process of being tried by courts for similar acts. Therefore, there is a club of prosecution hanging over the heads of people if they do not come forward, give information to the truth commission, and apply for amnesty. Thus, investigation and prosecution can fit together.

An example of the way they can work against each other is the Guatemalan case. The mandate of the truth commission states that none of the information given to them can be subsequently used by the courts. However, it is unclear what this means. Does it mean that one cannot take the file from the truth commission, walk it over to the court, and use it as the basis for indictment; or does it mean that any of the underlying information gathered in the course of the truth commission's investigation can be an obstacle to criminal justice, assuming the criminal justice system ever works.

One must look at how investigation, prosecution, and redress fit together, not in isolation. Moreover, the process really does matter. For example, the reason we think criminal trials can be beneficial may be in large part because we think it allows people to tell their story, to publicly testify, and it may be that the verdict itself is less important

65. *Id.*

than the process of the trial.

Similarly, the argument can be made that in the case of investigatory commissions, it is the process of reconciliation that is important. What is important is the process of holding hearings, taking testimony, and asking questions in the countryside where government officials may not have tread for twenty years. The report that comes out in the end may really be only secondary to the process of reconciliation. An example is the South African case. What seemed most interesting in that case was the process of enlisting the aid of NGOs,⁶⁶ who would go out into the entire country in a way that the commission staff could not. The NGOs would take statements from people who were never going to testify at the hearings, thus, the testimony of hundreds and hundreds of persons fed into the process. This testimony may be the significant part, not the end result.

Lastly, it is important to note the different goals and their effects on different levels. There are at least three levels: First, the international level, which is the level of international deterrence either by developing international law or developing the rule of law internationally. Second, the national level, where we talk of about reestablishing the legitimacy of the government. Finally, the local level which has been ignored or has not been given the importance it needs.

It seems that most people who live in countries going through transitions live their lives very much at the local level where things differ from one village to the next and there is not a good way of taking this fact into account on a policy level. Furthermore, the kinds of things most important to people may not be the things we're focusing our efforts on. For example, Manfred Nowak, who was the special expert on disappearances in the former Yugoslavia, recently resigned because he could not get enough support.⁶⁷ Nowak needed six million dollars to exhume graves in the former Yugoslavia and there are 20,000 people missing in Bosnia and another 5,000 in Croatia. We are spending many millions of dollars on these international tribunals and Nowak could not raise six million. Now, from an evidentiary point of view and more importantly from the view of the families, the most important issue may be just to know where the person is buried to be able to take the remains and rebury them. The commemorative aspect, the aspect of allowing people be able to mourn, both individually and collectively as villages, is lost when addressing prosecutorial or investi-

66. Non-governmental Organizations.

gatory strategy. We need to address these aspects again. We must think about exhumations, reburials, and remembrance ceremonies not as sort of an afterthought or add on, but as integral to the whole way things fit together. This concerns a more general trend that when we think about areas of law, we must think about the importance of the specific, the local, and the place specific. Moreover, we must think about these concerns in the areas of accountability and impunity.